

Pub. L. 116-283, §1831(c)(2)(F), as amended by Pub. L. 117-81, §1701(b)(10)(E)(ii), (iii), inserted heading.

Subsec. (b). Pub. L. 116-283, §1831(c)(4), as amended by Pub. L. 117-81, §1701(b)(10)(F), after redesignation of section 2306a(a)(2) of this title as subsec. (b) of this section, inserted heading and substituted “subsection (a)” for “paragraph (1)” and “section 3704 of this title” for “subsection (c)”.

Subsec. (c). Pub. L. 116-283, §1831(c)(5), after redesignation of section 2306a(a)(3) of this title as subsec. (c) of this section, inserted heading, redesignated subpars. (A) and (B) as pars. (1) and (2), respectively, and, in introductory provisions, substituted “subsection (a) (or under section 3704 of this title)” for “paragraph (1) (or under subsection (c))” and “subsection (b)” for “paragraph (2)”.

Subsec. (d). Pub. L. 117-81, §1701(c)(3)(B), substituted “this chapter” for “this section”.

Pub. L. 116-283, §1831(c)(6), after redesignation of section 2306a(a)(4) of this title as subsec. (d) of this section, inserted heading and substituted “section 3703 of this title” for “subsection (b)”.

Subsec. (e). Pub. L. 116-283, §1831(c)(7), after redesignation of section 2306a(a)(5) of this title as subsec. (e) of this section, inserted heading and substituted “section 3703(a)(3) of this title” for “subsection (b)(1)(C)”, “subsection (a)(3)” for “paragraph (1)(C)”, and “that subsection” for “that paragraph”.

Subsec. (f). Pub. L. 116-283, §1831(c)(8)(D), which directed substitution of “paragraphs (2)(B) and (3)(B) of subsection (a)” for “subparagraphs (B)(ii) and (C)(ii) of paragraph (1)”, could not be executed because the phrase “subparagraphs (B)(ii) and (C)(ii) of paragraph (1)” did not appear after the intervening amendment made by Pub. L. 117-81, §804(a), to subsec. (a)(6) of section 2306a of this title prior to its transfer to subsec. (f) of this section.

Pub. L. 116-283, §1831(c)(8)(C), which directed substitution of “that subsection” for “that paragraph” and could not be executed, was repealed by Pub. L. 117-81, §1701(b)(10)(G).

Pub. L. 116-283, §1831(c)(8)(B), substituted “subsection (a)” for “paragraph (1)”.

Pub. L. 116-283, §1831(c)(8)(A), as amended by Pub. L. 117-81, §804(b), inserted heading.

Subsec. (g). Pub. L. 116-283, §1831(c)(9), after redesignation of section 2306a(a)(7) of this title as subsec. (g) of this section, inserted heading and substituted “subsection (a)” for “paragraph (1)”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by section 1701(b)(10)(B)–(G) of Pub. L. 117-81 applicable as if included in the enactment of title XVIII of Pub. L. 116-283 as enacted, see section 1701(a)(2) of Pub. L. 117-81, set out in a note preceding section 3001 of this title and Effective Date note below.

Amendment by section 1701(c)(3) of Pub. L. 117-81 to take effect immediately after the amendments made by title XVIII of Pub. L. 116-283 have taken effect, see section 1701(a)(3) of Pub. L. 117-81, set out in a note preceding section 3001 of this title and Effective Date note below.

EFFECTIVE DATE

Section and amendment by Pub. L. 116-283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116-283, set out as an Effective Date of 2021 Amendment note preceding section 3001 of this title.

DATA COLLECTION

Pub. L. 117-81, div. A, title VIII, §862(b), Dec. 27, 2021, 135 Stat. 1852, provided that: “The Secretary of Defense shall develop and implement a plan to collect and analyze data on the use of authority under such section 873 [of Pub. L. 114-92, set out below] for the purposes of—

“(1) developing and sharing best practices; and
“(2) providing information to the Secretary of Defense and Congress on the use of authority under such section 873 and related policy issues.”

PILOT PROGRAM FOR STREAMLINING AWARDS FOR INNOVATIVE TECHNOLOGY PROJECTS

Pub. L. 114-92, div. A, title VIII, §873(a)–(g), Nov. 25, 2015, 129 Stat. 939, 940, as amended by Pub. L. 114-328, div. A, title VIII, §896, Dec. 23, 2016, 130 Stat. 2326; Pub. L. 116-283, div. A, title VIII, §832, Jan. 1, 2021, 134 Stat. 3753; Pub. L. 117-81, div. A, title VIII, §862(a), Dec. 27, 2021, 135 Stat. 1852, provided that:

“(a) EXCEPTION FROM CERTIFIED COST AND PRICING DATA REQUIREMENTS.—The requirements under section 2306a(a) of title 10, United States Code [now 10 U.S.C. 3702], shall not apply to a contract, subcontract, or modification of a contract or subcontract valued at less than \$7,500,000 awarded to a small business or nontraditional defense contractor pursuant to—

“(1) a technical, merit-based selection procedure, such as a broad agency announcement, or

“(2) the Small Business Innovation Research Program or Small Business Technology Transfer Program, unless the head of the agency determines that submission of cost and pricing data should be required based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award.

“(b) EXCEPTION FROM RECORDS EXAMINATION REQUIREMENT.—The requirements under subparagraphs (A), (B), and (C) of section 2313(a)(2) of title 10, United States Code [now 10 U.S.C. 3841(b)(2)(A)–(C)], and subsection (b) of section 2313 of title 10, United States Code [now 10 U.S.C. 3841(c)], shall not apply to a contract valued at less than \$7,500,000 awarded to a small business or nontraditional defense contractor pursuant to—

“(1) a technical, merit-based selection procedure, such as a broad agency announcement, or

“(2) the Small Business Innovation Research Program, unless the head of the agency determines that auditing of records should be required based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award, and if such performance audit is initiated within 18 months of the contract completion.

“(c) TREATMENT AS COMPETITIVE PROCEDURES.—Use of a technical, merit-based selection procedure or the Small Business Innovation Research Program or Small Business Technology Transfer Program for the pilot program under this section shall be considered to be use of competitive procedures for purposes of [former] chapter 137 of title 10, United States Code.

“(d) DISCRETION TO USE NON-CERTIFIED ACCOUNTING SYSTEMS.—In executing programs under this pilot program, the Secretary of Defense shall establish procedures under which a small business or nontraditional contractor may engage an independent certified public accountant for the review and certification of its accounting system for the purposes of any audits required by regulation, unless the head of the agency determines that this is not appropriate based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award.

“(e) GUIDANCE AND TRAINING.—The Secretary of Defense shall ensure that acquisition and auditing officials are provided guidance and training on the flexible use and tailoring of authorities under the pilot program to maximize efficiency and effectiveness.

“(f) SUNSET.—The exceptions under subsections (a) and (b) shall terminate on October 1, 2024.

“(g) DEFINITIONS.—In this section [enacting this note and amending section 638 of Title 15, Commerce and Trade]:

“(1) SMALL BUSINESS.—The term ‘small business’ has the meaning given the term ‘small business concern’ under section 3 of the Small Business Act (15 U.S.C. 632).

“(2) NONTRADITIONAL DEFENSE CONTRACTOR.—The term ‘nontraditional defense contractor’ has the meaning given that term in section 2302(9) of title 10, United States Code [now 10 U.S.C. 3014].”
 [Section 896(2)(B) of Pub. L. 114-328, which directed amendment of par. (2) of subsec. (b) of section 873 of Pub. L. 114-92, set out above, by inserting “, and if such performance audit is initiated within 18 months of the contract completion” before the period at the end, was executed by making the insertion before the period at the end of the concluding provisions of subsec. (b), to reflect the probable intent of Congress.]

§ 3703. Exceptions

(a) IN GENERAL.—Submission of certified cost or pricing data shall not be required under section 3702 of this title in the case of a contract, a subcontract, or modification of a contract or subcontract—

(1) for which the price agreed upon is based on—

(A) adequate competition that results in at least two or more responsive and viable competing bids; or

(B) prices set by law or regulation;

(2) for the acquisition of a commercial product or a commercial service;

(3) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this chapter may be waived and justifies in writing the reasons for such determination; or

(4) to the extent such data—

(A) relates to an offset agreement in connection with a contract for the sale of a weapon system or defense-related item to a foreign country or foreign firm; and

(B) does not relate to a contract or subcontract under the offset agreement for work performed in such foreign country or by such foreign firm that is directly related to the weapon system or defense-related item being purchased under the contract.

(b) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES.—In the case of a modification of a contract or subcontract for a commercial product or commercial services that is not covered by the exception to the submission of certified cost or pricing data in paragraph (1) or (2) of subsection (a), submission of certified cost or pricing data shall not be required under section 3702 of this title if—

(1) the contract or subcontract being modified is a contract or subcontract for which submission of certified cost or pricing data may not be required by reason of paragraph (1) or (2) of subsection (a); and

(2) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial product or commercial services to a contract or subcontract for the acquisition of an item other than a commercial product or commercial services.

(c) NONCOMMERCIAL MODIFICATIONS OF COMMERCIAL PRODUCTS.—(1) The exception in subsection (a)(2) does not apply to cost or pricing data on noncommercial modifications of a commercial product that are expected to cost, in the aggregate, more than the amount specified in section

3702(a)(1)(A) of this title, as adjusted from time to time under section 3702(g) of this title, or 5 percent of the total price of the contract (at the time of contract award), whichever is greater.

(2) In this subsection, the term “noncommercial modification”, with respect to a commercial product, means a modification of such product that is not a modification described in section 103(3)(A) of title 41.

(3) Nothing in paragraph (1) shall be construed—

(A) to limit the applicability of the exception in paragraph (1) or (3) of subsection (a) to cost or pricing data on a noncommercial modification of a commercial product; or

(B) to require the submission of cost or pricing data on any aspect of an acquisition of a commercial product other than the cost and pricing of noncommercial modifications of such product.

(d) COMMERCIAL PRODUCT OR COMMERCIAL SERVICE DETERMINATION.—(1) For purposes of applying the exception under subsection (a)(2) to the required submission of certified cost or pricing data, the contracting officer may presume that a prior commercial product or commercial service determination made by a military department, a Defense Agency, or another component of the Department of Defense shall serve as a determination for subsequent procurements of such product or service.

(2) If the contracting officer does not make the presumption described in paragraph (1) and instead chooses to proceed with a procurement of a product or service previously determined to be a commercial product or a commercial service using procedures other than the procedures authorized for the procurement of a commercial product or a commercial service, as the case may be, the contracting officer shall request a review of the commercial product or commercial service determination by the head of the contracting activity.

(3) Not later than 30 days after receiving a request for review of a determination under paragraph (2), the head of a contracting activity shall—

(A) confirm that the prior determination was appropriate and still applicable; or

(B) issue a revised determination with a written explanation of the basis for the revision.

(e) A contracting officer shall consider evidence provided by an offeror of recent purchase prices paid by the Government for the same or similar commercial products or commercial services in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison after considering the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased or applicable terms and conditions.

(f) DETERMINATION BY PRIME CONTRACTOR.—A prime contractor required to submit certified cost or pricing data under section 3702 of this title with respect to a prime contract shall be responsible for determining whether a subcontract under such contract qualifies for an ex-